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April 11, 2005

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Pamela Bonrud
Executive Director
SD Public Utilities Commission
500 E Capitol Avenue
Pierre SD 57501

RE: RCC Minnesota, Inc. and Wireless Alliance, L.L.C., d/b/a Unicel for Designation
as an ETC - Docket TC 03-193 GPGN File No. 7401.040099

Dear Ms. Bonrud:

Enclosed please find RCC Minnesota's Supplemental Brief in the above-entitled matter. I have also emailed the brief to all counsel. The hard copy and ten copies will be hand-delivered to you and by U.S. Mail, postage paid, to all counsel.

If you have any questions, please let me know.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosures

c: Via Email and US Mail to:

Darla Pollman Rogers
Richard Coit
James Cremer
Meredith Moore
John Smith
Clients

**Before the
South Dakota Public Utility Commission
500 East Capital Avenue
Pierre, South Dakota 57501-5070**

In the Matter of the Petition of)	
)	
RCC Minnesota, Inc.)	
Wireless Alliance, LLC)	Docket No. TC03-193
)	
For Designation as an Eligible)	
Telecommunication s Carrier)	
Under 47 U.S.C. Section 214(e)(2))	

To: The Commission

**SUPPLEMENTAL BRIEF OF RCC MINNESOTA, INC.
AND WIRELESS ALLIANCE, LLC**

RCC Minnesota, Inc. and Wireless Alliance, LLC (“RCC”) hereby submit their response to the Commission’s Order Granting Motion by Intervenors to Submit a Supplemental Brief (“Order”) released April 5, 2005. RCC provides comment on the FCC’s recent *Report and Order*, FCC 05-46 (March 17, 2005) (“*FCC ETC Order*”) setting forth new rules for ETC designations filed at the FCC and adopting permissive guidelines for state ETC designations.

I. Introduction.

The big news in the *FCC ETC Order* is that there is no big news. Despite a huge lobbying campaign from ILEC interests, the FCC declined to change the way states designate ETCs. Instead, drawing on its *Virginia Cellular* case, the FCC clarified its existing policies and specified some relatively minor additional requirements applicable to carriers filing petitions with the FCC. The rules adopted in the *FCC ETC Order* are not yet effective, and it is by no means clear which of the rules will survive reconsideration and judicial review, or what the rules will look like after all appeals have run their course.

Whatever rules survive the ongoing FCC process will only apply in ETC designation proceedings conducted by the FCC pursuant to its authority under 47 U.S.C. § 214(e)(6). The FCC made clear that the most it could do was offer “permissive guidelines” and that states ultimately have the statutory authority – and local expertise – to determine what conditions to apply and how to evaluate the public interest.

Thus, there has been no change of law in this proceeding. That much is not in dispute. Moreover, designating RCC under existing rules and standards will not prevent this Commission from giving due consideration to the FCC’s permissive guidelines. The only fair way to proceed is for the Commission to conduct a rulemaking of general applicability with full participation by all interested parties to determine whether any of the FCC’s guidelines should be adopted.

Even if the Commission grafts the FCC’s permissive guidelines onto the instant proceeding, the record as it stands supports a finding the RCC is qualified to be an ETC and that its designation will serve the public interest. RCC has made ample commitments to improve and build out its network, has demonstrated its ability to remain functional in emergencies, and has shown that it offers a wide variety of rate plans with local calling options that are comparable to or better than ILEC offerings. The Commission can add conditions to the grant if it wishes to receive additional information from RCC, without the need for additional testimony, hearings and briefing.

Finally, RCC agrees with Staff that the last sentence of A.R.S.D. 20:10:32:42 does not prevent this Commission from exercising its statutory authority to define a service area as something other than a rural ILEC’s entire study area and to obtain FCC concurrence to effectuate its conditional designation in such an area.

II. The FCC Followed the Intent of Congress, Which Gave States Discretion to Grant ETC Petitions Consistent with the Public Interest, Consistent with Federal Law.

One of the most important questions addressed in the *FCC ETC Order* was whether the FCC had the authority to adopt rules for ETC designations that state public utility commissions would be required to apply to petitions filed with states under Section 214(e)(2) of the Act, 47 U.S.C. § 214(e)(2). Unequivocally, the *FCC ETC Order* adopts rules applicable only to carriers filing a petition for ETC status with the FCC under 47 U.S.C. § 214(e)(6):

We decline to mandate that state commissions adopt our requirements for ETC designations. Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity... Because the guidelines we establish in this Report and Order are not binding upon the states, we reject arguments suggesting that such guidelines would restrict the lawful rights of states to make ETC designations.¹

While nothing in the *FCC ETC Order* is binding upon state commissions, it remains important for the Commission to continue to follow the intent of the 1996 Act. In determining the public interest, a state commission must confine its analysis to “[t]he purpose of the [Telecommunications] Act, the requirements it imposes, and the context of the provision[s] in question.”² The FCC has recognized that “Congress [never] intended for state commissions to have unlimited discretion” to determine the public interest in connection with petitions for ETC status.³ Thus, while the FCC can provide guidance, as set forth in the *FCC ETC Order*, they cannot abrogate a state’s obligation to uphold the intent of Congress.

The intent of Congress, as affirmed by the courts, could not have been more clear. The overarching intent of the 1996 Act was to “promote competition and reduce regulation . . . secure lower prices and higher quality services . . . and encourage the rapid deployment of new

¹ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, FCC 05-46 at ¶ 61 (rel. March 17, 2005) (“*FCC ETC Order*”) (footnotes omitted).

² *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932).

³ *Western Wireless Corp. Petition for Preemption of an Order of the S.D. Pub. Utils. Comm’n*, 15 FCC red 15168, 15180 (2000).

telecommunications technologies.”⁴ That is precisely what RCC’s petition will do for South Dakota consumers. The FCC has properly interpreted the promotion of universal service and competition as dual goals which must be pursued equally, chiding those who advocate rules that favor one class of carrier over another as presenting “a false choice between competition and universal service.”⁵ Federal courts have agreed, finding that:

Alongside the universal service mandate is the directive that local telephone markets be opened to competition. The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other.⁶

In determining whether consumers will benefit from federal high-cost support being used to construct new facilities, the Commission may rely on substantial and credible evidence provided by RCC, which has been summarized in its prior briefing papers. Nothing in the *FCC ETC Order* requires this Commission to change a single thing concerning ETC requirements or its public interest analysis.

III. Fundamental Principles of Administrative Law Dictate that RCC is Entitled to a Decision Based Upon Prevailing Law.

Not surprisingly, Intervenors argue that this Commission should simply subject RCC to the permissive guidelines recommended by the FCC, without engaging in thoughtful consideration of whether those standards are appropriate for South Dakota.⁷ Instead of proceeding with RCC’s ETC application under existing law and considering the permissive guidelines in a rulemaking, Intervenors seek a “solution” that would benefit them by engendering further delay: reopen the record, conduct further hearings, order a second set of supplemental

⁴ Pub.L.No. 104-104, 110 Stat. 56 (1996).

⁵ *Federal-State Joint Bd. on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8802-03 (1997), *aff’d in part, rev’d in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert denied*, 530 U.S. 1210, 1223 (2000), and *cert. dismissed*, 531 U.S. 975 (2000).

⁶ *Alenco, et al. v. FCC*, 201 F3d 608, 615 (5th Cir. 2000) (citations omitted).

⁷ See Supplemental Brief of Intervenors at p. 6.

briefs, and hold further oral argument. Aside from being unnecessary, this approach is inconsistent with all fundamental principles of administrative law.

Like a judge, an administrative agency has an obligation to decide an adjudicated matter under the law currently applicable. *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). While agencies may issue guidelines or interpretive rules without engaging in a notice-and-comment rulemaking, the Administrative Procedure Act requires a rulemaking proceeding if the agency action adopts a “new position inconsistent with . . . existing regulations.” *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 88 (1985). Where an agency “changes the rules of the game . . . more than a clarification has occurred.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

Nothing in the *FCC ETC Order* changed South Dakota law, created new precedent binding on this Commission or overruled this Commission’s previous designations. Thus, RCC is entitled to a decision under existing law.

IV. There is a Legally Sound Means of Dealing With the *FCC ETC Order*.

Intervenors would have the Commission apply permissive guidelines, which have not even become effective as of this date, to RCC’s ETC petition, effectively ‘moving the target’ that RCC has attempted to hit for over a year. RCC urges the Commission to follow fundamental principles of administrative law, and indeed the FCC’s lead in dealing with the *FCC ETC Order*, by applying current requirements and examining any rule changes in a rulemaking proceeding that would apply to RCC and all other ETCs.

If the Commission wishes to change its rules for designating ETCs, and for compliance requirements that ETCs must follow, it must do so in a rulemaking of general applicability. The FCC recognized as much by encouraging states to “impose the annual certification and reporting

requirements uniformly on all ETCs they have previously designated.”⁸ It is wholly inappropriate to reopen the record to take new evidence for a change of law, much less an FCC action that, even when it becomes effective, will not change law in South Dakota. The far better course is to complete this proceeding, based on the law now in effect. At any time, the Commission may open a rulemaking proceeding to determine whether new ETC petitioners and existing ETCs should be subject to new requirements.

Indeed, that is precisely what the FCC just did. Recognizing its duty to process ETC petitions under existing law, it continued to grant ETC petitions during the pendency of its rulemaking.⁹ In adopting its rules, it emphasized that any new standards resulting from that rulemaking would be applied to existing ETCs, requiring them to come into compliance by October, 2006.¹⁰ This Commission may do the same. All interested parties should be given a fair opportunity to participate in a rulemaking, to provide the Commission with comments, and to build a record that will permit a determination as to whether some or all of the FCC’s guidelines should be adopted as rules in South Dakota. To change course so late in this proceeding would be unfair to RCC and to all other current and potential ETCs in the state who would not have an opportunity to participate in the rulemaking process.

RCC requests the Commission to process its petition under the law in effect today, and if it deems it necessary, open a rulemaking to determine whether and how the FCC’s guidelines

⁸ *FCC ETC Order* at ¶ 20.

⁹ See, e.g., *Public Service Cellular, Inc.*, DA 05-259, 2005 WL 235794 (Wireline Comp. Bur., rel. Jan. 31, 2005) (designating competitive ETC in Georgia and Alabama); *Sprint Corp.*, 19 FCC Rcd 22663 (2004) (designating competitive ETC in Alabama, Florida, Georgia, New York, North Carolina, Tennessee, and Virginia).

¹⁰ *2005 Report and Order* at ¶ 20 (“We do not believe that different ETCs should be subject to different obligations, going forward, because of when they happened to first obtain ETC designation from the Commission or the state. These are responsibilities associated with receiving universal service support that apply to all ETCs, regardless of the date of initial designation.”)

should be adopted in South Dakota. To jump the gun as Intervenor's suggest will leave the Commission with "adjudicative rules" that will apply to future petitioners and existing ETCs who have had no opportunity to participate in the process for adopting such rules.

V. This Commission Has More Than Sufficient Evidence to Support RCC's Designation.

Nothing in the *FCC ETC Order* altered any of the fundamental principles upon which state commissions must determine ETC eligibility. During the pendency of the *FCC ETC Order*, the FCC continued to grant petitions for ETC status without conducting an adversarial hearing, permitting discovery from other parties, or requesting briefs. The FCC has simply required a carrier to submit a petition, complete with certifications, supporting data and argument. By all indications, it will continue to do so. This Commission has far more information from the petitioner upon which to base a determination than the FCC has ever received in any of its proceedings. RCC has provided substantial and credible evidence that a grant of ETC status would serve the public interest, *consistent with the intent of Congress*.

Should the Commission disagree with RCC and wish to apply the FCC's permissive guidelines to this proceeding, RCC can meet all of those standards. RCC's current compliance with many of the FCC's new standards finds ample support in the record as it stands. For example:

A. Commitment to provide the supported services. RCC has committed to respond to all consumers reasonably requesting service immediately – not at some future date. RCC has set forth a series of steps it will follow if service cannot be provided immediately with existing facilities and consumer premises equipment.¹¹ RCC has also demonstrated its commitment to use

¹¹ See *FCC ETC Order* at ¶ 22; Kohler Pre-filed Direct Testimony at p. 10 lines 7-9; Gruis Pre-filed Direct Testimony at pp. 8-10; Tr. Vol. 2 at pp. 63-64.

its funding for the improvement and expansion of service in underserved areas within its proposed ETC service area. First, RCC has committed to construct facilities that will bring improved service to four communities that it would not otherwise be able to undertake in the short term.¹² Second, RCC has also identified as a priority the overlay of CDMA technology on its northern network, bringing improved voice quality and system capacity, as well as laying the foundation for a high-speed mobile data network.¹³

Regarding the five-year network improvement plan in the FCC's permissive guidelines, Intervenors misleadingly suggest that the FCC's new guidelines would require "completing a build-out throughout the identified service areas where RCC is seeking designation" within five years.¹⁴ This is clearly not the standard the FCC adopted for its own ETC proceedings, nor is it a standard adopted by any other state in the country. Applicants to the FCC will be required to demonstrate their intent to use support lawfully by identifying areas where support will be spent to improve signal coverage and service quality.

RCC has done this with regard to its first twelve to eighteen months as an ETC, based on projected levels of high-cost support. Given the number of possible variables, such as for example, changes in existing federal high-cost support levels, possible changes in the FCC's rules governing how support to competitors will be distributed, and changes in the marketplace, the FCC's five-year plan will be of limited use. The far better course, in order to obtain reasonably reliable and accurate data, would be for the Commission to review what each ETC has done annually and require a new plan for the next year, to ensure that projected funds, which

¹² Exh. RCC/5 at 11.

¹³ Tr. Vol. 2 at 68 *ll.* 1-16.

¹⁴ Supplemental Brief of Intervenors at p. 13.

can be reasonably estimated, will go toward constructing facilities and providing services consistent with the law.

Should the Commission nonetheless wish to require RCC to submit a five-year plan for improving its network and services, the appropriate course of action would be to require RCC to do so in a post-designation compliance filing.

B. Ability to Remain Functional in Emergency Situations. RCC has also amply demonstrated its ability to remain functional in emergency situations. As Kyle Gruis stated in his direct pre-filed testimony, RCC's network is reinforced with battery backups at cell sites and generators at switches that can provide power indefinitely in the event of an electrical outage.¹⁵ The battery backups are in turn reinforced by portable generators that can be moved to cell sites to supplement the battery power, and key cell sites are outfitted with generators that can run unattended for several days before they need to be refueled.¹⁶ Mr. Gruis further emphasized that, because RCC's cell sites are so spread out, an electrical outage is unlikely to affect more than two sites simultaneously.¹⁷

Intervenors' attempt to establish deficiencies in this showing is unavailing. They focus on the absence of information regarding backups at "repeater type sites", yet they ignore RCC's clear testimony that it has portable generators available. Moreover, the FCC's new guidelines would not require backups at repeaters.¹⁸ Intervenors also state that there is no evidence RCC's network can "manage traffic spikes brought on by emergency situations," yet RCC has shown

¹⁵ Gruis Pre-Filed Direct Testimony, dated 5/10/04, Page 5 *l.* 11 through Page 7 *l.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See FCC ETC Order at ¶¶ 25-26.

that, even at peak traffic periods, its network has a call completion rate of 98%.¹⁹ With respect to the Intervenor's demand for information about "how the company reroutes traffic around facilities that are damaged," RCC can provide such information to the Commission. The problem with addressing this issue in an adjudication is that it has significant competitive neutrality implications and all carriers of all technologies would want to participate in developing such a rule.

C. Local Usage. Intervenor's take one sentence from the *FCC ETC Order* out of context and fabricate an apples-to-oranges comparison rule that the FCC did not adopt. Basing their entire argument on the FCC's requirement of "a local usage plan that is comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation",²⁰ Intervenor's argue that the Commission must engage in a complete accounting of each and every rate plan that RCC now offers, or may offer at some future time,²¹ and match up each plan against every rural ILEC's local service offering.²²

This is not the requirement the FCC adopted. The FCC's new rule will not require that competitors offer the same number of local minutes as the incumbent, or offer any specific minimum amount of local usage. Rather, the FCC's new standard examines whether the applicant will make available *a single rate plan* that offers *overall value* comparable to the incumbents' basic service plan. This is readily apparent in several of the FCC statements omitted from the Intervenor's supplemental brief. Specifically, the FCC concluded that a competitor

¹⁹ Gruis Pre-filed Direct Testimony, Page 5 *l.* 11 through Page 7 *l.* 2. Since most ILEC networks are engineered to permit a maximum of roughly 50% of the customers to use the phone at one time, the vague term used by the FCC – "traffic spike" – calls for clarification. Moreover, wireless network architecture is so different from wireline networks that localized traffic spikes affect each differently. Thus, any new requirement is best defined in a rulemaking proceeding.

²⁰ Supplemental Brief of Intervenor's at p. 15, *citing FCC ETC Order* at ¶ 32.

²¹ *Id.* at pp. 15-16.

²² *Id.* at p. 17.

could satisfy the local usage requirement by “offer[ing] a local calling plan that has a different local calling area than the local exchange area provided by the LECs in the same region, or . . . propos[ing] a local calling plan that offers a specified number of free minutes of service within the local service area.”²³ The FCC never ruled that it intended to compare each competitive and incumbent rate plan. The proper standard is whether a competitor offers customers an alternative to basic wireline service.

Indeed, for a competitor to emulate basic wireline service by offering the ability to make toll-free calls to only a few hundred or few thousand other phone numbers within a handful of exchanges would frustrate consumers’ ability to enjoy “the benefits of increased consumer choice and the unique advantages and disadvantages of the competitor’s service offering.”²⁴ It is difficult to imagine how the public would benefit from requiring RCC to offer service that mirrors an ILEC rate plan, and we can find nothing in the *FCC ETC Order* that evidences such an intent.

RCC has provided ample record evidence that its customers can choose from rate plans that are equivalent to or better in value than any of the incumbents’ rate plans. As RCC stated in its initial Brief, RCC offers “a variety of local calling plans, all of which it believes will cover much larger geographic areas than plans available from competing ILECs.”²⁵ For example, RCC’s MyZone plan, offers unlimited local calling for \$38.00 per month. Calls can be placed from anywhere within RCC’s South Dakota ETC service area and the local calling is to the entire State of South Dakota. Long distance is priced at five cents per minute.²⁶ Wireless

²³ *FCC ETC Order* at ¶ 33.

²⁴ *Id.* at ¶ 41. *See also Highland Cellular, Inc.*, 19 FCC Rcd 6422, 6432 (2004) (“*Highland Cellular*”).

²⁵ RCC Brief at p. 13.

²⁶ *See* Petitioners’ Hearing Exhibit 10.

Alliance offers a similar plan, called ROVER II, with unlimited local calling for \$32.95 per month within the company's footprint and long distance priced at fifteen cents per minute.

The Commission need look no further to conclude that these plans deliver far greater than "comparable" value to a consumer looking for basic telephone service. The substantial savings on intra- or interLATA toll charges typically levied on wireline calls made beyond a local calling area consisting of just a few exchanges makes this a compelling value and ensures that South Dakota consumers have an affordable telephone service option. Moreover, because RCC and Wireless Alliance each have one rate plan of comparable or greater value than the incumbents' offerings, consumers throughout the proposed ETC service area will benefit and there is no need for the exhaustive accounting of rate plans Intervenor's call for.

Should the Commission wish to compare RCC's rate plans to those of ILECs, the Commission may take official notice of the rates set forth in the ILECs' tariffed service offerings without supplementing the record. RCC would be pleased to provide additional information on its rate plans should the Commission require it in a compliance filing. As with the FCC's other new requirements, however, RCC urges the Commission to reserve consideration of their possible adoption for a rulemaking to which all ETCs will be subject.

D. Cream skimming. The *FCC ETC Order* provides nothing new in this regard. Rather, it only codifies requirements or considerations that have been applied by the FCC for well over a year. Indeed, the *FCC ETC Order* explicitly states that "we will perform an examination to detect the potential for cream skimming effects that is similar to the analysis employed in the *Virginia Cellular ETC Designation Order* and the *Highland Cellular ETC Designation Order*."²⁷ This analysis includes "examining the degree of population density

²⁷ *FCC ETC Order* at ¶ 48.

disparities among wire centers within rural service areas, the extent to which an ETC applicant would be serving only the most densely concentrated areas within a rural service area, and whether the incumbent LEC has disaggregated its support to a smaller level than the service area (e.g., at the wire center level).”²⁸

There is ample record evidence that exceeds in detail the information relied upon by the FCC in *Virginia Cellular* and *Highland Cellular*. Moreover, the parties have already fully briefed the cream skimming issue under the standards set forth in the *FCC ETC Order*. RCC will not address Intervenor’s recycled arguments here and instead refers the Commission to the parties’ briefing papers.

VI. THE ADMINISTRATIVE RULE CITED NO EFFECT ON THIS COMMISSION’S AUTHORITY TO DESIGNATE RCC IN RURAL ILEC SERVICE AREAS.

Congress has granted states the authority to designate ETCs, 47 U.S.C. § 214(e)(2), and to redefine a competitive ETC’s service area as something other than the ILEC’s entire study area. 47 U.S.C. § 214(e)(5). Such redefinition takes effect upon a grant of concurrence by the FCC. 47 C.F.R. § 54.307(c). Notably, Congress has not stated that redefinition must occur prior to a conditional ETC designation.

To implement its authority under 47 U.S.C. § 214(e)(2), South Dakota has adopted an administrative rule encompassing the language contained in the federal statute. That administrative rule, A.R.S.D. 20:10:32:42 states:

The commission on its own motion or upon request shall designate a local service provider which meets the requirements of 47 C.F.R. § 54.201 (September 10, 1998) to serve as an eligible telecommunications carrier within each service area of the state. Upon request and consistent with the public interest, convenience, and necessity, the commission may, in an area served by a rural telephone company, and shall, in all other areas, designate more than one local service provider as an eligible telecommunications carrier for a service area designated by

²⁸ *Id.* at ¶ 49.

the commission, so long as each additional requesting carrier meets the requirements of 47 C.F.R. § 54.201 (September 10, 1998). The Commission may not, in an area served by a rural telephone company, designate more than one eligible telecommunications carrier absent a finding that the additional designation is in the public interest. *In reviewing any proposed additional eligible telecommunications carrier designation within an area served by a rural telephone company, the commission may not find it to be in the public interest if the provider requesting such designation is not offering its services coextensive with the rural telephone company's service area* (emphasis added).

The question presented at the recent hearing was whether the last sentence of the rule precludes RCC's first proposal – to be designated throughout its FCC-licensed area. It does not preclude RCC's first proposal for two reasons. First, the rule on its face cannot be read to frustrate federal policy, which favors redefinition of rural ILEC service areas in cases where a competitive ETC cannot serve an entire ILEC study area because it was not licensed throughout such area. It would be consistent with federal policy to find that the Commission “may” determine to not grant ETC status in such a situation if for example, the new entrant chose to serve an area less than its FCC-licensed territory for reasons the Commission deemed improper.

A second reason why it does not preclude RCC's first proposal is that the regulation cannot be read in isolation, but must be read in conjunction with other rules that address ETC designation. *Estate of He Crow v. Jensen*, 494 N.W.2d 186, 190 (S.D. 1993) (holding the intent of a rule must be determined through an analysis of the other rules concerning the same subject) (citing *Border States Paving, Inc. v. S.D. Dept. of Revenue*, 437 N.W.2d 872 (S.D. 1989)). Generally, administrative rules “are subject to the same rules of construction as statutes.” *Id.* at 190. As such, administrative rules are to be read to be consistent and in harmony under the doctrine of *pari material*. *M. B. v. Konenkanp*, 523 N. W.2d 94, 97-98 (S.D. 1994). Once the above rule is read in conjunction with A.R.S.D. 20:10:32:45, it becomes apparent that such a designation can be conditional pending a completion of a recommendation for redefinition of the pertinent service areas.

Rule 20:10:32:45 reads:

The commission decision on a request for designation as an eligible telecommunications carrier must include a determination of the applicable service area. In the case of a service area served by a rural telephone company, “service area” means the company’s “study area” unless and until the commission and the Federal Communications Commission establish a different definition of service area for the company. If the commission proposes to define the service area served by a rural telephone company to be other than the company’s study area, the commission shall, consistent with 47 C.F.R. § 54.207 (September 10, 1998), petition the Federal Communications Commission for its approval prior to making any such change.

A.R.S.D. 20:10:32:45. Clearly, this provision would be nullified by a reading of A.R.S.D.

20:10:32:42 that precludes a favorable public interest finding whenever a proposed ETC service area differs from an ILEC’s study area.

The FCC has recently rejected such a prohibition, emphasizing that it would “ignore[] the provision in section 214(e)(5) that allows redefinition to occur.”²⁹ Moreover, the FCC has admonished that “requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers.”³⁰ Reading the rule in isolation so as to preclude redefinition could subject the rule to federal preemption. 47 U.S.C. § 332(c)(3). The North Dakota Public Service Commission acknowledged as much in a recent order: “A state law that would be construed to deny designation of federal ETC status based on a study area requirement could essentially prohibit the [Applicants’] ability to provide the supported services.” *Northwest Dakota Cellular of North Dakota L.P. et al.*, Case Nos. PU-1226-03-597 et al., at p. 12 (Feb. 25, 2004) (“Northwest Dakota Order”).

Just like the governing statutes, the administrative rules provide no sequencing requirements for the two actions: the Commission may designate a competitive ETC in a rural

²⁹ *FCC ETC Order* at ¶ 75.

³⁰ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8882 (1997) (“*First Report and Order*”).

area upon a public interest finding, and the Commission may redefine an ILEC's service area pending concurrence of the FCC. As a result, the only logical way to read the above rules together is that the Commission may properly make a public interest finding and grant conditional approval of RCC's Petition in rural ILEC service areas RCC does not serve in their entirety, pending redefinition as provided for under A.R.S.D. 20:10:32:45 and 47 U.S.C.A. § 214(e)(5). Upon FCC concurrence, RCC would then be able to offer services throughout its designated service area. Unless and until such concurrence is granted, the Commission's public interest finding in those areas would not take effect.

A look at ETC designations by other states and the FCC reveals that this is the generally accepted approach. For example, under the above congressional authority, the Minnesota PUC granted preliminary approval of RCC's companion petition for designation as an eligible telecommunications carrier. *In the Matter of the Petition of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182, 6181/M-02-1503 (July 31, 2003). The Minnesota PUC adopted the recommendation to grant preliminary ETC designation. *Id.* at p.5. With respect to the rural ILEC areas subject to redefinition, it made the recommended ETC designation contingent upon FCC concurrence. *Id.* Notably, the redefinition proposed was the same as is presently before this Commission, to reclassify each ILEC wire center as a separate service area. *Petition of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2), Findings of Fact, Conclusions of Law, and Recommendation*, OAH Docket No. 3-2500-15169-2; PUC Docket No. PT-6182, 6181/M-02-1503. Hence, the Minnesota PUC found that conditional ETC designation pending FCC concurrence was appropriate under the governing statutory mandates.

RCC's designations in Oregon and Kansas proceeded in the same manner, with the state commissions granting final designation in non-rural areas and rural ILEC areas RCC proposed to serve in their entirety, and conditional designation in certain rural ILEC service areas pending FCC concurrence with the proposed redefinition. *RCC Minnesota, Inc.*, UM 1083 at p. 16 (Or. PUC, June 24, 2004); *RCC Minnesota, Inc.*, Docket No. 04-RCCT-338-ETC, at pp. 34-35 (Ks. Corp. Comm'n, Sept. 30, 2004). Other states, as well as the FCC in exercising its designation authority under 47 U.S.C. § 214(e)(6), have taken the same approach.³¹

In sum, this approach is the only way to appropriately read the South Dakota Administrative Rules. If one were to read the last sentence as A.R.S.D. 20:10:32:42 as preventing an application for designation as an ETC until services were co-extensive with a rural telephone company service area, then the empowerment of the Commission under A.R.S.D. 20:10:32:45 to determine the applicable service area upon designation of an ETC would become moot: one could not have a petition for ETC that was not co-extensive and, therefore, one would never reach the determination phase found under A.R.S.D. 20:10:32:45. A conditional

³¹ See, e.g., *Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1586 (2004) ("*Virginia Cellular*") ("Upon the effective date of the agreement of the Virginia State Corporation Commission with the Commission's redefinition of the service areas for those rural telephone companies, this designation of Virginia Cellular, LLC as an ETC for such areas as set forth herein shall also take effect."); *United States Cellular Corporation*, 8225-TI-102 at 9 (Wisc. PSC Dec. 20, 2002) ("[W]here US Cellular is asking for ETC designation in some, but not all, parts of the territory of a rural telephone company, the Commission conditionally grants ETC status in the areas for which US Cellular has requested such designation . . . If the FCC approves use of the smaller area, then US Cellular's ETC status for the smaller area(s) becomes effective."); *N.E. Colorado Cellular, Inc.*, Docket Nos. 00A-315T and 00A-491T at p. 8 (Colo. PUC Dec. 21, 2001) at Exhibit 1 pp. 6-7 (ALJ Dec. 21, 2001) (" . . . NECC has satisfied all legal criteria for immediate designation as an ETC and should be granted such status immediately by the Commission, pending . . . any necessary FCC approval of initial [redefinition] of service areas. . ."); *Dobson Cellular Systems, Inc.*, Case No. U-14257, at p. 2 (Mich. PSC, Sept. 21, 2004); *Northwest Dakota Order, supra*; Centennial Cellular Tri-State Operating Partnership et al., Cause No. 41052-ETC-46, at p. 24 (Ind. Util. Reg. Comm'n, Dec. 15, 2004); *Smith Bagley, Inc.*, Docket No. T-02556A-99-0207 at p. 16 (Ariz. Corp. Comm'n Dec. 15, 2000); *Smith Bagley, Inc.*, Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation at 21 (Aug. 14, 2001), *aff'd*, Final Order (N.M. Pub. Reg. Comm. Feb. 19, 2002); *Easterbrooke Cellular Corp.*, Case No. 03-0935-T-PC at p. 64 (W.V. PSC, May 14, 2004).

designation as an ETC awaiting the redefinition of the service area, as requested by RCC, is the most economical, practical approach and the most logical reading of these rules.

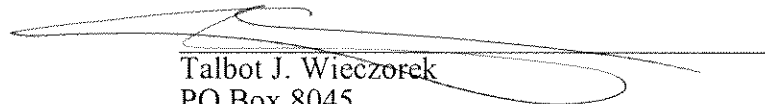
VII. CONCLUSION

With each passing month, federal high-cost funds that could be used to improve telephone service for South Dakota consumers is lost. RCC's ETC designation is not set in stone. Far from it. The Commission has an opportunity each year to review RCC's progress – and is that not the acid test of ETC status – whether funds are used to deliver new services to consumers?

The proper focus of this proceeding is consumers and whether they will benefit from RCC's designation. RCC is ready, willing and able to deliver on its promises and requests prompt action on its petition so that it can demonstrate here what it has demonstrated in Maine, Vermont, Oregon, Washington, Minnesota, Alabama, and Mississippi – a commitment to use high-cost support to improve its network to compete with all telephone carriers, which ultimately will benefit all consumers.

Respectfully submitted this 11th day of April, 2005.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition of RCC
Minnesota, Inc., and Wireless Alliance, L.L.C.,
d/b/a Unicef for Designation as an Eligible
Telecommunications Carrier

Docket No. TC 03-193

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the **11th** day of **April, 2005**, I served a true and correct copy of **RCC Minnesota, Inc., and Wireless Alliance, L.L.C., d/b/a Unicef's Supplemental Brief** by Email and U.S. Mail, postage paid (Email and hand-delivery to Ms. Bondrud) to:

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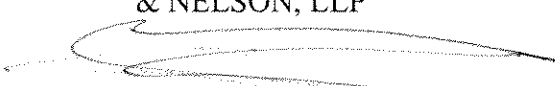
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